

To: Reynolds, Rebekah[Reynolds.Rebekah@epa.gov];
Wade.H.Hargrove@hawaii.gov[Wade.H.Hargrove@hawaii.gov]
Cc: Diliberti, James J DLA CIV GENERAL COUNSEL[(b) (6)]; Hommon,
Rebecca M CIV CNRH, N00L[(b) (6)]; Ahuna, Andre CIV NAVSUP FLCPH, Code
03[(b) (6)]; Whitacre, Jan M CIV NAVSUP FLC Pearl Harbor[(b) (6)];
Yee, Corinne S CIV NAVFAC HAWAII[(b) (6)]
From: Daugherty, Steven A CIV NAVFAC Pacific, 09C
Sent: Tue 11/3/2015 3:36:33 AM
Subject: RE: Red Hill Third Party NDA
[NDA - Third Party Subject Matter Expert 30Oct2015ver.pdf](#)
[smime.p7s](#)

Rebekah,

As mentioned in my prior message, a revised 30Oct draft of the NDA including the addition of "Nothing in this document limits my rights to request information under the Freedom of Information Act or restricts the use of information obtained through the Freedom of Information Act" is attached for discussion purposes. However, our preference would still be for use of the 29Oct version, with any reference to rights under FOIA to be conveyed separately either orally or in the EPA/DOH cover letter.

We have several concerns with the addition:

First, we have never seen FOIA preservation of rights language in an NDA and do not believe that it is a good precedent.

Second, it should be noted that this form will be used for more than just BWS, and while BWS may not be very likely to have commercial interests in the planned procurements, some of the other possible third party SME's might be more likely to have such interests or to discover that they have such interests after participation in the AOC process, we believe that there might be procurement integrity act issues involved if an entity with a commercial interest in the planned procurements were to attempt to use the FOIA to obtain release of information that they would have no knowledge of absent their participation as a SME under the AOC.

Third, use of this FOIA language almost seems like an invitation for the BWS and other SME's to participate in the AOC process in bad faith to gain knowledge and then request documents from the Parties that they might not know about if they were not at the table.

Fourth, although BWS is fully aware of its rights under FOIA, and would no doubt submit FOIA requests with or without the language, other SME's, and other individuals who may see the NDA if BWS publicizes it as we expect, may not be as aware of FOIA as the BWS, and inclusion of the language may result in additional and possibly burdensome FOIA requests that might otherwise not be interjected into the AOC process. All of the Parties have limited resources, and time spent in dealing with these additional requests would be better spent working on substantive issues.

We would appreciate an opportunity to discuss further before a decision is made. I will be in meetings from about 0830 to 1200 HI time tomorrow, but will try to call you in my early morning or early afternoon.

v/r,

Steven Daugherty
Associate Counsel, NAVFAC PAC
(b) (6)

-----Original Message-----

From: Reynolds, Rebekah [mailto:Reynolds.Rebekah@epa.gov]
Sent: Friday, October 30, 2015 2:36 PM
To: Daugherty, Steven A CIV NAVFAC Pacific, 09C
Cc: Wade.H.Hargrove@hawaii.gov
Subject: RE: Red Hill Third Party NDA

Steven,

Can there be a statement along the lines of "rights under FOIA are not waived?". My program thinks that such a statement might ease acceptance of the agreement.

Best,

Rebekah Reynolds
Assistant Regional Counsel
Office of Regional Counsel
Environmental Protection Agency - Region 9
(415) 972-3916

-----Original Message-----

From: Daugherty, Steven A CIV NAVFAC Pacific, 09C (b) (6)
Sent: Friday, October 30, 2015 5:00 PM
To: Reynolds, Rebekah
Cc: Wade.H.Hargrove@hawaii.gov
Subject: Red Hill Third Party NDA

Rebekah,

As requested, the third party NDA we are requesting is attached. I confirmed with my clients that they believe that since the SME's are being invited by EPA/DOH it is appropriate for EPA/DOH to provide the NDA to the SME's.

v/r,

Steven Daugherty
Associate Counsel, NAVFAC PAC

(b) (6)

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